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HARVARD LAW REVIEW.

VOL. XVIII.

DECEMBER, 1904.

No. 2

EQUITABLE CONVERSION.¹

II.

CARE should be taken to distinguish accurately between the two purposes for which a testator may direct a sale of his land, namely, that of disposing by the will of the proceeds of the sale, or of some part thereof, or of some interest therein, and that of satisfying a lien or charge on the same land, particularly when such lien or charge is created by the same will which directs the sale. Between these two purposes there is the same distinction as between being the owner of property and being a creditor of such owner. A lien or charge is in its nature a real obligation,² and it is so called because it binds a thing (*res*) in the same manner as a personal obligation binds a person. The word "lien" has, indeed, the same meaning and the same origin as the word "obligation," though it is commonly used only to designate an obligation which is real. A personal obligation, while it imposes a burden on one person, confers upon another person a correlative right to have that burden carried. The burden which an obligation imposes is called a debt³ (*debitum*), the person upon whom the burden is imposed is called a debtor (*debitor*), and is said to owe the debt, while the person

¹ Continued from 18 HARV. L. REV. 22.

² As to real obligations, see 13 HARV. L. REV. 539.

³ The reader will perceive that the term "debt" is here used in its broad Roman sense, not in its technical and narrow English sense.

upon whom the correlative right is conferred is called a creditor, and to him the debt is owed. Whenever, therefore, there is a debt of any given amount, there must always be a creditor as well as a debtor, and each for the same amount as the debt, and whenever either of the three ceases to exist, the other two cease to exist also. Moreover, what is thus true of a personal obligation is also true of a real obligation, except that in a real obligation the burden is imposed upon a thing. Accordingly, wherever there is a charge on land, there must necessarily be a person to whom the amount of the charge is owed, as well as land which owes it.

A real obligation is either legal or equitable. When it is legal, it binds the property even in the hands of a purchaser for value and without notice; when it is equitable only, it ceases to bind the property the moment the latter comes into the hands of a person who pays value for it, and who is not chargeable with notice that it is subject to an obligation. A rent-charge is an instance of a real obligation which is legal. A lien or charge on land created by will is, however, equitable only, unless some legal estate or interest be devised to secure its payment.

Where a testator, instead of imposing a lien or charge on the land which he directs to be sold, bequeaths to some person a portion of the proceeds of the sale, the rights of the legatee will be those of a co-owner, not those of a creditor, — *i. e.*, they will be absolute rights, not relative rights.¹ The rights of an owner of property are in some respects superior to those of a creditor of the same property, while in other respects they are inferior. For example, if the property increases in value the owner will enjoy all the benefit of the increase, while if it decreases in value all the burden of the decrease will fall upon him, a creditor, whose debt is a charge on the property, having no interest either in its increase or decrease in value so long as it is sufficient to pay his debt. So long as the payment of the debt is sure, the value of the creditor's rights is fixed and invariable, while the value of the owner's rights constantly fluctuates with the fortunes of the property. Hence, if a testator wishes to create a charge on his land, he must fix the amount of it,² — which he generally does by naming its amount in lawful

¹ For the distinction between absolute rights and relative rights, as those terms are here used, see 13 HARV. L. REV. 537, 546, n. 1.

² The amount of the charge need not, however, appear on the face of the will; it is sufficient if the will furnish the means of ascertaining its amount. Thus, in *Cook v.*

money, — while if he wishes to give a portion of the produce of the land which he directs to be sold he must designate such portion as some fractional part of the whole. If, therefore, a testator direct his executors to sell his land and pay one tenth of its total produce to A, A will be co-owner of such produce, and it is impossible that he should be anything else, while if the direction to the executors be to pay A \$1000 out of the produce of the land, the \$1000 will constitute a charge on the land, and A will be a creditor of the land for that amount, and it is impossible that he should be anything else.¹ It will be seen, therefore, that a pecuniary legacy is always and necessarily a charge, and so the legatee is in the nature of a creditor, though of course he ranks behind the testator's own creditors. If a pecuniary legacy be given, without any indication of the fund out of which it shall be paid, it will constitute a charge on the testator's entire personal estate, out of which alone it will be payable. If the testator declare that the legacy shall be paid out of the produce of his land, it will then constitute an equitable charge on the land, either in aid of the personal estate, or *pro rata* with it, or exclusive of it, according to circumstances.

If a testator give to A one tenth of the produce of land which he directs to be sold, such one tenth exists independently of the testator, and of course independently of the gift which he makes of it, *i. e.*, it exists in the form of land until the land is sold, and then in the form of produce of the land. Any failure, therefore, of the gift to A, whether because of his death during the testator's life, or for any other reason, will have no other effect upon the

Stationer's Co., 3 M. & K. 262, a testator devised his land to his executors in trust to sell enough, with the aid of his personal estate, to purchase £10,700 of 3 per cent consols. The amount of the charge, therefore, would depend upon the price of consols when the purchase was made. This case is also cited, *infra*, p. 91.

¹ In Page v. Leapingwell, 18 Ves. 463, a testator devised land to trustees in trust to sell the same, but not for less than £10,000, and out of the proceeds to pay four legacies, amounting in all to £7800, and to pay the residue to A; and the land having been sold for less than £10,000, Sir W. Grant, M. R., held that each of the five legacies must be deemed specific, *i. e.*, a fractional part of the £10,000, and therefore all must abate ratably. It seems, however, very difficult to sustain this view. 1. It is not obvious what authority there was to sell the land for less than £10,000 without the consent of all parties in interest. 2. If the land had been sold for more than £10,000, it seems clear that A would have been entitled to all that remained after deducting £7800. 3. The testator says, in the most explicit terms, that the four legatees are to receive in the aggregate £7800, and there is nothing in the will to raise a doubt that the testator meant what he said. He does not intimate what amount A will receive.

one tenth intended for A than to cause it to remain with the testator's heir, instead of being taken from him for the benefit of A. So, if the testator give to A, or to A, B, and C successively, limited interests in the whole of the produce of the land which he directs to be sold, and make no further disposition of such produce, the consequence will be that the reversionary interest therein, expectant on the termination of the interest of A, or of A, B, and C, will be undisposed of by the testator and so will remain with his heir. But if, on the other hand, a testator give to A \$1000 out of the produce of the land which he directs to be sold, the \$1000 will be purely the testator's own creation, and therefore it will have no existence until the testator's death, and it will not come into existence even on the death of the testator, unless it then vests in A. If, therefore, A die before the testator, or even before the right to receive the \$1000 vests in him, such right will never come into existence, and the land will devolve as if no such gift had been made by the testator. So, if the testator give to A, or to A, B, and C successively, a life interest in \$1000, and make no disposition of the ultimate interest, the consequence will be that the \$1000 will cease to exist as a separate interest on the death of A, or of A, B, and C, and that, too, whether it had been actually raised or whether it still remain a charge on the land, the interest only having been raised and paid. If the \$1000 have been raised, it will belong, on the expiration of the life interest or interests, to the owner of the land at whose expense it has been raised, though, of course, it will be money in his hands; if it have not been raised, it will sink into the land for the benefit of its owner, *i. e.*, it will cease to be a charge on the land.

In short, in the case of a testamentary charge on land, any failure of the testator to make a complete and effective gift of the entire sum charged will also cause a failure to the same extent of the charge itself; and the fact that the money charged has been actually raised, if such be the fact, will have no other effect upon so much of it, or of such interest in it, as is not disposed of, than to convert the land to that extent into money, leaving the ownership of the money, however, where the ownership of the land would have been if the money had not been raised. It may be added that a direction by a testator that a sum of money charged by him on his land be paid to his executor as such is not a valid disposition of the money charged, and hence it does not make the charge valid. A gift to one's own executor as such is, indeed, no

more than a gift to oneself, and therefore amounts only to an illegal and invalid attempt to cause one's land, to the extent of the gift, to devolve as if it were personal estate.¹

The reader must not infer from what has been said that a debt, in order to be the subject of a testamentary charge, must be created by the will which creates the charge, nor even that it must be in existence when the will is made, for it is, in fact, not material how or when the debt is created, it being sufficient that it is in existence when the testator dies. Nothing, indeed, was formerly more common in England than for a testator, by his will, to charge his land with the payment of all his debts, the reason being that simple contract debts of a deceased person were formerly not payable by law out of his land, and hence must go unpaid, in case his personal estate was insufficient to pay them, unless he made provision by his will for their payment out of his land. For similar reasons, it is very common for a testator to charge his land generally with the payment of all his pecuniary legacies, such legacies being otherwise payable out of his personal estate alone.

Plain as the foregoing distinctions seem to be, they have not always been recognized or acted upon by the courts.

Thus, in *Cruse v. Barley*,² the testator directed the residue of the proceeds of a sale of his land, with the residue of his personal estate, to be divided among his five children, the eldest son to receive £200 at twenty-one, and the remainder to be divided equally among the other four; and the eldest son having died under twenty-one, the court held that the £200, so far as it consisted of the produce of the land, went to the only surviving son and heir. It is clear, however, that the £200 constituted a charge on the entire residue, and hence must have been paid in full, though the other four children had received nothing, and the eldest son could not be a creditor of the estate for £200 and, at the same time, a part owner of it in respect to the same £200.

So in *Emblyn v. Freeman*,³ where land was conveyed by deed in trust to sell the same after the grantor's death, and divide the surplus proceeds equally among persons named, after deducting £200 — which, however, was not disposed of, the court held that the £200 went to the grantor's heir. It seems clear, however, that, as

¹ *Arnold v. Chapman*, 1 Ves. 108; *Henchman v. Attorney-General*, 2 Sim. & S. 498, 3 M. & K. 485.

² 3 P. Wms. 20.

³ Ch. Prec. 541.

no disposition was made of the £200, there was no authority to deduct it for any purpose.

In *Arnold v. Chapman*,¹ where the testator in terms charged his land with the sum of £1000, but made no valid disposition thereof, the court held that the £1000 went to the testator's heir; and yet it seems certain, first, that no debt was created, inasmuch as there was no creditor, and secondly, if a debt was created, that it could not devolve by operation of law, nor otherwise than as directed by the will. In other words, it could not devolve upon the heir. In *Henchman v. Attorney General*,² which was like *Arnold v. Chapman*, except that the testator left no heir, the court (which seems to have been much embarrassed by the decision in *Arnold v. Chapman*) was compelled to hold that the charge sank for the benefit of the devisee of the land.

In *Hutcheson v. Hammond*³ it was held that the amount of a lapsed pecuniary legacy of £1000, payable out of the proceeds of a sale of land directed by the testator, went to the heir, although the will contained an express bequest of the residue of such proceeds.

In *Hewitt v. Wright*,⁴ land was conveyed by deed to trustees, charged with £1500, which the trustees were to raise, on the death of the grantor and his wife, and invest and pay the interest, in the events which happened, to the grantor's daughter, D., for her life, and no further disposition was made of the £1500, — which was raised, invested, and the interest paid as directed; and it was held that on the death of D. the personal representative of the grantor was entitled to the £1500. This was equivalent to holding that the grantor, immediately on the delivery of the deed, acquired a right, on the death of the survivor of himself and wife, to have the £1500 raised for his own benefit, subject only to the right therein of D. In truth, however, D. was the only person who ever had such a right, and it was only to the extent of her right that the £1500 was ever a burden on the land. Hence, if D. had died before the money was raised, the land would have been wholly discharged from the burden. Having been raised, therefore, the money belonged to the owner of the land, subject to D.'s rights therein, and on the death of D. it went back to the land, *i. e.*, to its owner.

¹ 1 Ves. 108.

² 3 Bro. C. C. 128. See this case *infra*, p. 92.

³ 1 Bro. C. C. 86.

⁴ 2 Sim. & S. 498, 3 M. & K. 485.

In *Collins v. Wakeman*,¹ where a testator charged his land with £1000, of which he made no disposition, it was held that the heir was entitled to the £1000, the court assuming that there was no difference, in respect to the claim of the heir, between such a gift and a gift of one tenth (for example) of the produce of the land directed by the testator to be sold.

In *Jones v. Mitchell*,² where a legacy of £800, payable out of the proceeds of a sale of land directed by the testator, was given to trustees for charities, and the gift was therefore void, its nullity was held to inure to the benefit of the testator's heir, notwithstanding that the will contained an express bequest of the residue of such proceeds.

In *Amphlett v. Parke*, it was held by Lord Brougham,³ reversing the decree of Sir J. Leach, V. C.,⁴ that the amount of certain lapsed pecuniary legacies, payable out of the proceeds of a sale of land directed by the testator, went to the testator's heir, notwithstanding that the will contained an express bequest of the residue of such proceeds.

In *Watson v. Hayes*,⁵ where a testator devised land in trust to be sold, and the proceeds divided among his five children, after reserving a sum, the interest of which would pay an annuity of £400 to his wife for her life, and the wife died before the land was sold, the court held that the sum which should have been reserved went to the heir. It seems clear, however, that the testator intended to give the land to his five children, subject only to a charge of the annuity. If, therefore, the land had been sold, and a sum reserved as directed, such sum would have belonged to the children, though the wife would have been entitled to have it held by the trustees during her life to secure the payment of her annuity. The land not having been sold, and the annuity having expired, the case in favor of the five children was still stronger. Even if it should be held that the gift to the five children did not include the sum to be reserved, it is not obvious what authority the trustees would have had to reserve any sum out of the proceeds of a sale, except to secure the payment of the annuity.

In *Burley v. Evelyn*,⁶ where a testator gave £5000, out of the

¹ 2 Ves. Jr. 683.

² 1 Sim. & S. 290. See this case *infra*, p. 92.

³ 2 R. & M. 221. See this case *infra*, p. 93.

⁵ 5 M. & Cr. 125.

⁴ 1 Sim. 275.

⁶ 16 Sim. 290.

proceeds of land directed by him to be sold, to A for life, with remainders void for remoteness, and gave the residue of such produce to B, it was held that the void remainders went to the heir, though the truth seems to have been that, on the land's being sold, the entire proceeds of the sale vested in B, subject to a charge thereon of £5000, in favor of A, for his life.

In *Croft v. Slee*,¹ a testator gave the Swan Inn to his heir, charged with £500 in favor of the testator's wife, who however died before her interest, which was only for her life, had vested; but, she being also residuary legatee, her executor filed a bill against the heir to have the £500 raised and paid as part of the testator's personal estate, and, though the bill was properly dismissed, yet Sir R. P. Arden, M. R., said that, If the wife had died after her interest had vested, and the £500 had been raised and invested, it would have become, on the wife's death, a part of the testator's personal estate, and the wife's executor would have been entitled to it as such. Moreover, *Simmons v. Pitt*,² which does not differ substantially in its facts from *Croft v. Slee*, contradicts even the decision in the latter; for in both cases alike a sum of money charged on land had not been raised, and in both the question was whether a sum of money, in respect of which the charge had failed, should be raised, and in *Simmons v. Pitt* it was held that it should. For what purpose? In order that it might be paid to the personal representative of him who created the charge and who died intestate. The fact that the charge was created by virtue of a power was not material, for the power itself was created by the person who exercised it. The settlor in a marriage settlement reserved the power to himself, and therefore it was just the same as if he had created the charge directly in the marriage settlement, instead of doing it indirectly. So far, therefore, as the gift of the money charged on the land was incomplete or invalid, the charge failed, and the failure inured to the benefit of the owner of the land, namely, the heir of him who created the charge. As has already³ been seen, a charge on land is never of any efficacy, except so far as there is an effective and valid gift of the money charged. To say otherwise would be to say there can be an obligation and an obligor without an obligee.

On the other hand, in *Wright v. Row*,⁴ it was held that an annuity charged on land in favor of a charity, and consequently void,

¹ 4 Ves. 60.

³ *Supra*, p. 86.

² L. R., 8 Ch. 978.

⁴ 1 Bro. C. C. 61.

sank for the benefit of the devisee of the land. *Barrington v. Hereford*,¹ *Jackson v. Hurlock*,² *Baker v. Hall*,³ *Sutcliffe v. Cole*,⁴ *Tucker v. Kayess*,⁵ and *Heptinstall v. Gott*⁶ are also to the same effect.

So in *Cook v. Stationer's Co.*,⁷ where a testator devised his land in trust to sell enough, with the aid of his personal estate, to purchase £10,700 of 3 per cent consols, his gift of £3300 of which, being to charities, was void, and the testator gave all the residue of his property to his wife, it was properly held that the gift to the charities sank for the wife's benefit, though some of the reasoning of Sir J. Leach, M.R., is not very satisfactory nor very intelligible.

In *Salt v. Chattaway*,⁸ it was properly held that, while a lapsed share of the testator's residuary estate, so far as it consisted of the produce of his real estate, went to the heir, the lapse of a pecuniary legacy inured to the benefit of the residuary legatee.

In *In re Cooper's Trusts*,⁹ where a testator devised land, subject to a charge of £1000 in favor of his daughter E. for life, and died in 1816, and the £1000 was raised in 1840, and the daughter died in 1844, it was properly held that the £1000, when raised, belonged to the then owner of the land, subject to E.'s life interest therein, but that it devolved henceforth as money.

In *In re Newberry's Trusts*,¹⁰ where land was charged by will in 1829 with the sum of £1000 in favor, in the events which happened, of the testator's daughter for life, and then of the daughter's husband for life, and the testator died in 1833, and the money was then raised, and the daughter lived till 1868, and her husband till 1869, it was held that the £1000 from the time when it was raised belonged to the owner of the land, subject to the life interests of the daughter and her husband, but that it was money in his hands, and hence, on his death in 1865, the money devolved on his personal representative.¹¹

Sometimes a testator who directs a sale of land combines the two objects before mentioned, *i. e.*, first directs a fixed amount to

¹ Cited 1 Bro. C. C. 61.

² 2 Eden 263, Ambl. 487.

³ 12 Ves. 497.

⁴ 3 Dr. 135.

⁵ 4 K. & J. 339.

⁶ 2 J. & H. 449.

⁷ 3 M. & K. 262. This case is also cited *supra*, p. 84, n. 2.

⁸ 3 Beav. 576.

⁹ 4 De G., M. & G. 757.

¹⁰ 5 Ch. D. 746.

¹¹ See also *Heptinstall v. Gott*, 2 J. & H. 449.

be paid out of the proceeds of the sale in the form of pecuniary legacies or otherwise, and then gives the residue of such proceeds to some other person or persons, and in such cases, if any part of such fixed amount fails, by lapse or otherwise, the failure inures to the benefit of the person or persons to whom the residue of the proceeds of the sale is given, just as it would inure to the benefit of the testator's heir or devisee if such a residue had not been disposed of. This principle ought to have been applied in the case of *Kennell v. Abbott*,¹ where the testator gave the residue of the proceeds of a sale of land directed by him to his niece, B. K., whom he also made his general residuary legatee; but the court held instead that the latter took such residue as general residuary legatee.

In *Hutcheson v. Hammond*² a lapse of a pecuniary legacy was held to inure to the benefit, neither of the person to whom the residue of the proceeds of the sale was given, nor to the residuary legatee, but to the heir.

So in *Jones v. Mitchell*,³ where a testator gave £800 out of the proceeds of land which he directed to be sold to trustees for charities, and the residue of such proceeds to J. R., it was held that the nullity of the gift of the £800 inured to the benefit, not of J. R., but of the testator's heir.

In *Page v. Leapingwell*,⁴ in which £200 of the proceeds of a sale of land directed by the testator was given to charities, it was held that the £200 sank for the benefit, not of A, to whom the residue of such proceeds was given, but to the testator's general residuary devisee and legatee. According, however, to the view adopted by the M. R., namely, that the gift to charities was not the fixed sum of £200, but one fiftieth of the entire proceeds of the sale, the consequence of the failure of the gift was that the one fiftieth went to the testator's heir.

In *Noel v. Lord Henley*,⁵ where a testator devised land to trustees in trust to sell the same and pay to his wife, whom he also appointed his residuary legatee, the sum of £5000 out of the proceeds of the sale, and the wife died during the testator's life, it was held successively, by the Court of Exchequer and the House

¹ 4 Ves. 802.

² 3 Bro. C. C. 128. See this case *supra*, p. 88.

³ 1 Sim. & S. 290. See this case *supra*, p. 89.

⁴ 18 Ves. 463.

⁵ 7 Price, 241, Daniel, 211, 322.

of Lords, that the £5000 sank for the benefit of the legatees of the residue of such proceeds.

In *Amphlett v. Parke*¹ a testatrix devised land to her executors in trust to sell the same, and pay legacies out of the proceeds of the sale, and then gave the residue of such proceeds to one of said trustees on certain trusts; and some of the legatees having died during the life of the testatrix, Sir J. Leach, V. C., held, though for unsatisfactory reasons, that their legacies sank for the benefit of the residuary legatee of such proceeds, but Lord Brougham, on appeal, held that the amount of the lapsed legacies went to the heir. There was an appeal to the House of Lords, but the case was compromised, the heir and the legatee of the residue dividing the fund between them.

In *Green v. Jackson*² a testator devised land to his executors in trust to sell the same and apply certain specified sums to charities and the residue of the proceeds of the sale for the benefit of certain persons named, and the gift to the charities being void, it was held, though for unsatisfactory reasons, that the nullity of those gifts inured to the benefit of the legatees of the residue of the proceeds of the sale.

There is also another distinction between a direction by a testator to sell his land for the purpose of making a gift of the proceeds of the sale, and a direction by him to sell the same land for the purpose of satisfying a charge thereon, namely, that, in the former case, the direction constitutes the sole authority for making the sale, and is therefore indispensable to the validity of the gift, while, in the latter case, the purpose of the testator will be entirely accomplished by making a gift of the money, and charging the same on the land, as he will thereby subject the land to a real obligation, and the regular and appropriate mode of enforcing such an obligation is by selling the thing which is subject to it. Still another distinction is that, in the former case, however small a portion of the proceeds of the sale the testator may give away, the heir will have no means of preventing a sale of the whole of the land, as it is only by such sale that the amount of money to which the legatee will be entitled can be ascertained, while, in the latter case, the heir can always prevent a sale of any of the land by paying the amount charged on it, as the obligation to which the land is subject will thus be extinguished.

¹ 1 Sim. 275, 2 R. & M. 221. See this case *supra*, p. 89.

² 5 Russ. 35, 2 R. & M. 238.

As the validity and effect of every testamentary direction to sell land and of every testamentary charge on land depends so largely upon the testamentary gift or gifts which are made of the proceeds of such sale and of the money so charged, it becomes important to ascertain how, *i. e.*, by what words, such gift or gifts can be made.

A testamentary gift of the produce of land directed by a testator to be sold partakes of the nature partly of a gift of land and partly of a gift of personal property. On the one hand, the property is in the form of land when the testator dies, and therefore the executor has nothing to do with it. The land descends to the heir unless it is devised to a trustee to be sold, and remains vested in the heir until it is sold, and the legatee receives his legacy, either through the trustee to whom the land is devised, or through the person who is directed to make the sale. Moreover, a gift of the produce of land directed to be sold will include, by implication, a gift of the rents and profits of the land, until the sale is made, unless there be an express gift of such rents and profits. From the testator's death also to the time of the sale a right is vested in the legatee to have the land sold. On the other hand, the equitable ownership of the land never vests in the legatee, but remains in the heir from the testator's death until the sale, subject to the right of the legatee to receive the rents and profits, as just stated, and the legatee receives the corpus of his legacy in the form of money. For most practical purposes, therefore, the gift is a gift of personal property, but of personal property which does not belong to the testator at the time of his death. By what form of words, then, can such a gift be made?

It is the office of a will, as it is of a deed, to transfer property, the most important difference between the two being that a deed takes effect upon delivery, while a will takes effect only upon the death of the testator. Presumptively a will, like a deed, produces, the moment that it becomes operative, all the effect that it ever produces, *i. e.*, it transfers all the property which the testator, at the moment of his death, is capable of transferring, and which he shows an intention to transfer. Moreover, to show an intention to transfer all the property which the testator shall at his death be capable of transferring, the best way is for him to use the fewest and most comprehensive words of description. For example, these three words, "all my property," will be sufficient in every case that can happen. If, however, the testator expects his will

to produce an effect, not at his death, but at some subsequent time, and especially if the effect be such as the testator is not capable of producing at the time of his death, he must declare his intention by specific and appropriate words. If, for example, a testator, instead of devising his land beneficially, which he could do by the three words just named, wishes to have the same sold after his death, and to have the money thus obtained divided among certain persons, he must give the requisite authority and direction to sell the land, and must then give the money to those whom he wishes to have it, or direct it to be divided among them, and if he should simply authorize and direct a sale of his land, and then say, "I give all my property to A, B, and C to be divided among them equally," A, B, and C would take all his property in the condition that it was in at his death, and his direction to sell his land would go for nothing.

If, then, a testator should authorize and direct his executors to sell his land, and divide the proceeds of the sale among A, B, and C equally, and should appoint D his residuary legatee, and A should die during the testator's life, what would become of the one third of the proceeds of the sale of the land which the testator intended for him? I trust the reader will have no doubt as to how this question should be answered, namely, that the one third will go to the testator's heir. It is certain that D can make no claim to it; nor could he if the testator had said: "If any of my property shall not be otherwise effectively disposed of by this my will, I give the same to D," unless, indeed, such a gift would be a devise to D of one third of the testator's land. To enable D to say the testator had given to him the one third of the proceeds of the sale of the land which was intended for A, the gift to D must contain words showing that the testator had the proceeds of his land distinctly in his mind and intended to include them in his gift, so far as they should be otherwise undisposed of.

Next, suppose a testator give to A, B, and C \$1000 each, and charge the same on his land, either in aid of his personal estate, or concurrently with it, or exclusively of it, and appoint D his residuary legatee, and A dies during the testator's life. What will become of the legacy intended for A? The true answer seems to be that nothing will become of it, as it will never have any existence. The only consequence of A's death will be that there will be more property by \$1000 for some one else than there would otherwise have been. The legacies to A, B, and C differ from

pecuniary legacies pure and simple only in having additional security for their payment, and in the fact that, so far as they fall upon the testator's land, his executor as such will have nothing to do with them, and neither of these circumstances is at all material for the present purpose. A's death, therefore, like the death of any pecuniary legatee before his legacy vests, will leave everything respecting the testator's estate just as it would have been if no legacy had been given to A. To whose benefit, then, will the lapse of A's legacy inure? So far as it would have fallen upon the personal estate, its lapse will inure to the benefit of D; *i. e.*, his residuary bequest will be so much larger. So far as A's legacy would have fallen upon the testator's land, its lapse will inure to the benefit of the testator's heir, *i. e.*, by the extinguishment of the obligation to which the land would otherwise have been subject. If the land had been devised beneficially, of course the lapse would have inured to the benefit of the devisee instead of the heir. It could not possibly inure to the benefit of D, except as already stated. How could the testator have prevented the lapse from inuring to the benefit either of D or of the testator's heir? Only by giving to some one else a legacy of the same amount as that intended for A, and charged on the land in the same manner.

It will be seen, therefore, that a lapse, whether of a gift of a portion of the produce of land directed to be sold, or of a pecuniary legacy exclusively charged on land, will inure to the benefit of the person to whom the land, subject to the direction to sell it, or subject to the charge, shall devolve at the testator's death, unless the testator shall do something to prevent such a result, though the reasons in the two cases will be entirely different. How then can a testator divert the benefit of a lapse, or other failure, of the gift, in these two classes of cases, from the person to whom the land will devolve, to the testator's residuary legatee? In cases of the first class he can do this by simply including in his residuary gift so much, if any, of the money, produced by the sale of his land, as shall not be otherwise effectively disposed of by his will. But, though such an intention is not improbable, and may be easily expressed and in a great variety of ways, yet it must be expressed in some way, — it can never be inferred. In cases of the second class, however, it seems that the testator cannot divert the benefit of the lapse, from the person to whom the land will devolve, to his residuary legatee *as such*; for, as he can give the benefit of the lapse to another person only by giving him a legacy of the same

amount, and by charging it upon the land in the same manner, if he give such a legacy to his residuary legatee, the latter will not take it as residuary legatee, but as any other person would take it, so that he will fill the two characters of residuary legatee and pecuniary legatee. The fact, therefore, that one is a residuary legatee will not aid him, in the least, in proving that he also has a pecuniary legacy charged on land, and he must therefore adduce the same evidence that would be required of any other person, *i. e.*, he must show that the testator has given him a pecuniary legacy, of the same amount as that intended for A, and has charged it upon his land in the same manner.

Such, it is conceived, are the principles which govern these two classes of cases. The authorities, however, are in a very unsatisfactory condition. Unfortunately, when the question first arose, the erroneous view still prevailed that the produce of land directed by will to be sold constituted a part of the testator's personal estate at the time of his death, and devolved as such under his will, and hence the early cases erroneously decided that such produce, if not otherwise effectively disposed of, would pass under an ordinary residuary bequest;¹ and, though the principle on which these cases were decided was long since repudiated, yet the cases themselves have never been in terms overruled, and they have continued to exert a most mischievous influence even to the present moment.

Thus, in *Kennell v. Abbott*,² and *Page v. Leapingwell*,³ the old view fully prevailed; for, in the former, it was held that the proceeds of a sale of land directed by a testator, so far as the same was not otherwise disposed of by the testator, went to his general residuary legatee; and in *Page v. Leapingwell*, in which a pecuniary legacy, payable out of the proceeds of a sale of land directed by the testator, was void by statute, it was held that the amount of that legacy passed to the general residuary legatee and devisee.

In *Maugham v. Mason*,⁴ Sir W. Grant, M. R., held that a residuary bequest did not carry the produce of land directed by the testator to be sold, but his decision did not affect the authority of the two earlier cases.

¹ *Mallabar v. Mallabar*, Cas. T. Talbot, 78; *Durour v. Motteux*, 1 Ves. 320, 1 Sim. & S. 292, n. (d).

² 4 Ves. 802.

³ 18 Ves. 463.

⁴ 1 V. & B. 410.

In *Byam v. Munton*,¹ it was held that a bequest of the residue of the testator's personal estate included the produce of land directed to be sold, but it was upon the strength of the context of the will. The same was also held, and for the same reason, in *Griffiths v. Pruett*.² There seems, however, to have been nothing in the context to warrant the decision, except that it shows that the testator intended to dispose of all his property. The proceeds of a sale of his land were not, however, a part of his property when he died, and there was nothing in the terms of his residuary bequest to indicate that he intended to include such proceeds. The inference rather was that he thought the latter would constitute a part of his personal estate when he died, and would *therefore* pass by the residuary clause. All the previous gifts were of pecuniary legacies, and it is clear that none of these could have been paid out of the proceeds in question, though the personal estate had been insufficient to pay them, and yet the testator clearly expected them to be paid out of his personal estate and out of such proceeds indiscriminately. There would seem to have been a much stronger reason for holding that the land itself passed by the residuary clause. It was not devised otherwise, but was simply directed to be sold; and as there was no gift of the proceeds of the sale, the direction to sell was invalid and inoperative. Moreover, the residuary clause was in its terms equally applicable to real and personal estate.

In *Spencer v. Wilson*³ it was held that the produce of land directed to be sold passed under the words "The residue of my said personal estate so converted into money," and this seems to have been a reasonable construction of the will. The testator directed a sale of all his land, and all the residue of his personal estate which did not consist of money, and payment of his debts, legacies, and life annuities, out of his money and the proceeds of said sale. Subject to these payments the residue of said personal estate so converted into money was to go to the testator's four natural children, each to receive his share when he attained twenty-one, or, in the case of daughters, married, the income of the share of each to be applied for his benefit in the meantime. The fund was, therefore, to remain in the hands of trustees for a considerable time, and the gift of it consisted entirely in directions to the trustees to pay or apply it. In giving directions to his

¹ 1 Russ. & M. 503.

² 11 Sim. 202.

³ L. R., 16 Eq. 501.

trustees, therefore, the testator naturally looked upon the property, not as it would be at the time of his death, but as having the quality which he expected it to have as and when his directions became operative. In fact, the testator's property consisted mostly of land, and it had all been sold and there was a large residue.

In *Court v. Buckland*¹ the testator directed his executors and trustees to sell his land, and so much of his residuary personal estate as should be of a salable nature, and get in the rest, and to dispose of the net money to arise from such real and residuary personal estate "according to the trusts hereinafter declared concerning the same." In fact, however, he afterwards declared no trusts of such net money, but only of his residuary personal estate. Still, it was held by Sir G. Jessel, M. R., that the trust thus declared included the proceeds of the sale of land, not because such proceeds were personal estate when the testator died, but because he thought himself authorized so to change the words just quoted as to make them read, "according to the trusts hereinafter declared concerning my residuary personal estate." It is submitted, however, that this was assuming a power which no court can rightfully exercise, namely, the power of making a will for a testator when he has failed himself to make such a will as he intended to make. The truth seems to be that the testator, in his residuary gift, used the words "residuary personal estate" by mistake, instead of the words "the net money arising from my real and personal estate."²

The most singular case of all, however, is that of *Watson v. Arundel*,³ in which the Irish Court of Appeal in Chancery and the House of Lords, successively and unanimously, held, reversing the decree of the court below, that a residuary legatee as such took the produce of land directed by the will to be sold, though the will contained in terms no disposition whatever of such proceeds, and afforded no evidence whatever that the testator used the term "residuary legatee" in any other than its legal sense. Upon this case I submit to the reader the following propositions: 1. The testator gave pecuniary legacies to an amount much exceeding the total amount of his personal estate, and, though he said noth-

¹ 1 Ch. D. 605.

² According to the report, the testator used the phrase "net money" three times, and the phrase "my residuary personal estate" five times, in his will.

³ Irish Reports, 10 Eq. 299, 11 *id.* 53; s. c. (*nom.* *Singleton v. Tomlinson*) 3 A. C. 404.

ing as to the property out of which such legacies should be paid, yet there is no reason to doubt that he expected them to be paid out of the produce of his land, at least in aid of his personal estate, and both courts held that the land was by implication charged with the payment of such legacies ratably with the personal estate. 2. The arguments in favor of the pecuniary legacies being a charge on the land have no bearing on the question whether the produce of the land was given to the residuary legatee. These arguments did, indeed, in the view that the courts took of them, have the effect of creating a fund for the residuary legatee by leaving for him a portion of the personal estate which would otherwise have been entirely exhausted by the pecuniary legacies; but they did not aid the courts in the least in enlarging that fund by including in it the residue of the produce of the land. Imposing an obligation upon land is an entirely different thing from giving the proceeds of the sale of the same land.¹ 3. The residuary clause contains in terms no gift of anything, but simply appoints a residuary legatee, the words being, "I constitute T. Tomlinson my residuary legatee." These, moreover, are the last words in the will, and, though they do not constitute an entire sentence, yet the previous part of the sentence has no connection with them in sense, it being merely a gift of certain specific articles to another person. Nor is the slightest light thrown upon the residuary clause by any part of the will, unless the direction to sell the testator's land be regarded as throwing light upon it. A direction by a testator, express or implied, to sell land is, indeed, a *sine qua non* of any gift of the proceeds of a sale of such land, but it does not constitute the smallest element in any such gift. 4. It inevitably follows that the residuary clause carried nothing except what was personal

¹ In *Wildes v. Davies*, 22 L. J., Chan. 495, a testator devised his land to his executors in trust to sell the same, and hold the proceeds, with the residue of his personal estate, on the trusts thereafter declared. In fact, however, he afterwards declared no trusts, but simply gave pecuniary legacies and appointed residuary legatees. It appeared from the will that the testator intended that his pecuniary legacies should be a charge on his land, and the question was whether the residue of the proceeds of the sale of the land should go to the residuary legatees or to the heir; and Stuart, V. C., failing to distinguish between a charge on land and a gift of the proceeds of the sale of land, declared that, as the pecuniary legacies were payable out of the proceeds of the sale of the land, there was a gift of such proceeds to the pecuniary legatees to the extent of their legacies, and hence the testator must have used the term "legacy" as including the proceeds of the sale of his land. His conclusion was, therefore, that the residue of such proceeds went to the residuary legatee.

It is submitted that the will sufficiently shows that the testator regarded the giving of legacies as a declaration of trust and, if so, all difficulty is removed.

estate prior to the testator's death, and therefore the decision proves that the testator's land was, by the direction to sell it, converted in equity into personal estate during the testator's life, *i. e.*, before the will took effect. 5. If, therefore, full effect is to be given to the decision, it places the law of the United Kingdom where it was prior to the case of *Ackroyd v. Smithson*,¹ *i. e.*, at the time when *Mallabar v. Mallabar* and *Durour v. Motteux* were decided.

In conclusion it may be said that *Court v. Buckland*, and *Watson v. Arundel* are conspicuous illustrations of the adage that "Hard cases make bad law."

I have hitherto treated only of the indirect mode of converting land into personal property, namely, that of selling the land; but, though this is the most common mode, and the one which is attended with the most important legal consequences, and is the only one which is connected with equitable conversion, yet there is a direct mode of converting land into personal property which requires some attention, namely, that which is effected by severing a portion of the land from the general mass, and thus converting the severed portion into a chattel.

These two modes of conversion differ from each other, not only in the particular just adverted to, but in other particulars also. The former not only requires the mental and physical co-operation of the respective owners of the things to be exchanged for each other, but also involves an interchange of the ownership of each, and this requires, in addition to the co-operation of the parties, the sanction of the law. The latter, on the other hand, involves only the physical act of severance, and that act may not only be performed by a single person, but may be performed by a total stranger to the land as well as by its owner, and hence may be wrongful as well as rightful. For the present purpose, however, it will be necessary to consider only such acts of severance as are rightful.

The most familiar instance of converting land into chattels by a rightful severance of a portion of the land from the general mass is the gathering of the annual crops. Until gathered, annual crops are a part of the land, but the moment they are severed from the land, they become personal property, and belong to the person by whom, or by whose authority, they are rightfully gathered. Rents also follow the analogy of annual crops, the reason probably being

¹ 1 Bro. C. C. 503.

that the annual rent of agricultural land anciently consisted of a portion of the crops. Hence rent not yet payable is a part of the land, but the moment it becomes payable it is personal property. When, therefore, a landowner dies, the land, with all rent and income thereafter to accrue, goes to the heir, while arrears of rent, with other income already accrued, go to the executor.¹

Another common instance of converting land into chattels by acts of severance is the cutting of timber. Timber differs from an annual crop in this, that, while the right to gather an annual crop, and the ownership of the crop when gathered, are regularly vested in the person for the time being rightfully in the possession of the land, the right to cut timber, and the ownership of the timber when cut, are regularly vested only in the owner of the inheritance (*i. e.*, in fee or in tail) in possession of the land. In the case of a settled estate, however, it frequently happens that timber requires to be cut, either because it is deteriorating in quality, or because it requires thinning, or for both of these reasons, and yet there is no person in existence who is authorized to cut it, the tenant in possession commonly being only tenant for life. In such cases, therefore, courts of equity have assumed jurisdiction to order the timber to be cut and sold, acting on behalf of all persons in interest.² The proceeds of the sale of the timber will, therefore, follow the same rule that would be followed by the proceeds of the sale of the land, if the land were sold, *i. e.*, it will follow the limitations of the settlement, until it comes to a person who has an estate of inheritance in possession in the land, — at which moment it will vest in such person absolutely, but as personal property. Thus, in *Hartley v. Pendarves*,³ where timber on an estate vested in A for life, with remainder to B in fee, was ordered to be cut, and the same was cut and sold, and the proceeds invested, and A received the dividends till her death,⁴ in October, 1888, and then B received them till his death, in June, 1894, it was held that the *corpus* of the fund devolved on his personal representative; and it would have been the same though B had been only tenant in tail. And though, in *Field v. Brown*,⁵ where timber was cut, by the order of the court, on an estate vested in A for life, remainder

¹ See Williams on Executors, Pt. II. Bk. III. Ch. I. § II. p. 724, 727 of 9th ed.

² See *Hartley v. Pendarves*, [1901] 2 Ch. 498, 500.

³ [1901] 2 Ch. 498.

⁴ See *Tooker v. Annesley*, 5 Sim. 235.

⁵ 27 Beav. 90.

to her issue in tail, remainder to B for life, remainder to his issue in tail, remainder to B in fee, and B died without issue, and his remainder in fee descended to A as his heir, and then A died without issue, it was held that the fund, in which the proceeds of the sale of the timber had been invested, passed with the land to A's heir, yet the decision was disapproved in *Hartley v. Pendarves*, where it was also intimated that the decision was inconsistent with the subsequent decision by the same judge in *Dyer v. Dyer*,¹ and that the judge committed the same error in *Field v. Brown* that he had previously committed in *Cooke v. Dealey*.²

If a tenant for life of a settled estate cut and sell timber without authority, the proceeds of the sale will follow the limitations of the settlement, just as if the cutting and selling had been pursuant to the order of a court of equity, except that the tenant for life will not be permitted to derive any benefit from his wrongful acts, and hence the entire proceeds of the sale will go to those who shall be entitled to the estate in remainder or reversion.³

Another common instance of converting land into personal property by acts of severance is the digging of mines. This mode of severing a portion of land from the general mass does not seem, however, to have given rise to any questions requiring special attention in this place.

Thus far, as the reader will have observed, while I have been writing under the title of "Equitable Conversion," I have in fact occupied myself exclusively with actual conversion, and with certain legal questions and distinctions upon which actual conversion and equitable conversion alike depend. Perhaps, therefore, the reader will say I have been wrong, either in the title that I have chosen, or in what I have written under that title; and, with a view to avoiding or mitigating such a criticism, I will state briefly my reasons for the course that I have taken.

I do not think I have made any mistake in selecting my title. I regard it as indispensable that a title should be brief, and also intelligible on its face. If my title had been "Conversion," it would have been brief, but it would not have been intelligible. I doubt, indeed, if many readers would have had any definite idea of what I proposed to write about if I had adopted that title. The term "Equitable Conversion," on the other hand, is both brief and intelligible. Moreover, my sole object has been, from the beginning,

¹ 34 Beav. 504.

² 22 Beav. 196.

³ *Powlett v. Duchess of Bolton*, 3 Ves. 374.

to write upon equitable conversion, and my only reason for admitting other topics has been that a consideration of them would facilitate the accomplishment of that object. I think, therefore, there is no doubt that "Equitable Conversion" was my proper title.

Nor do I think I have made any mistake in what I have written under the title of "Equitable Conversion." 1. As equity is in the nature of a supplement to the common law, no branch of equity can be thoroughly understood, unless its relation to the common law is understood. 2. When any branch of equity is founded upon or involves principles of law as well as principles of equity, every student should acquire a knowledge of the former before he attempts to master the latter. 3. The subject of equitable conversion involves all the legal principles and distinctions which have been discussed in the preceding pages. 4. All the cases which have been cited and discussed are always treated in the books as cases of equitable conversion. 5. The only question open to me, therefore, was whether I should deal with actual conversion and those legal principles and distinctions which are common to actual conversion and equitable conversion before taking up the latter, or whether, ignoring the subject of actual conversion, I should treat those principles and distinctions as a part of the doctrine of equitable conversion, and it seemed to me there could be no doubt that the former was my true course. 6. The reader may, therefore, regard the preceding pages as clearing the way for what may be considered as the proper subject of this series of articles.

C. C. Langdell.

CAMBRIDGE, October 15, 1904.